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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

v.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
E. H. RATCLIFF,
JOSEPH E. BROWN,
W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees,
By GARNER W. GREEN.

Of Counsel:
BRADLEY, BALDWIN, ALL & WHITE.

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SUPREME COURT OF THE UNITED STATES.

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No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

v.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

MOTION TO DISMISS OR AFFIRM.

Come Enochs Lumber & Manufacturing Company, Ingalls Iron Works, O. L. Bunn, doing business as Bunn Electric Co., Coburn Trolley Track Mfg. Co., Gibbens & Gordon, Inc., Hockaday, Inc., The R. C. Lieb Co., Natchez Drug Co., National Show Case Co., Schwartz & Stewart, Walter C. Schultz, doing business as Schultz Cabinet Works, Southern Cement Co., Truscon Steel Co., White Stone Co., Woodward, Wight & Co., R. Lee Parker, Jr., R. Scudamore, Jr., R. Lee

Parker, Jr., and R. Hicks Parker, co-partners, doing business as Natchez Brick Co., C. R. Burkett, doing business as Burkett Sheet Metal Works, W. A. Jacobie, Geisenberger Bros. Drug Co., M. P. Phelan, Mosler Safe & Lock Co., Appellees in intervention, and severally, though joining herein to avoid prolixity, move to dismiss as to each of them, or to affirm for want of substantial Federal question, and for reasons, assign:

I.

The judgments in the Supreme Court of Mississippi in favor of Appellees (Tr., 74-83) were several judgments rendered, jointly against *Hartford Accident & Indemnity Company* and *Ætna Casualty & Surety Company,* surety on the appeal bond to that Court. No appeal has been taken by Ætna Casualty & Surety Company, and hence, there is no jurisdiction at the instance of Hartford Accident & Indemnity Company alone.

II.

But if said appeal were properly had, which movants deny, then thereunder, as to these movants, dismissal must be had because there are no pleadings and/or proof in the transcript whereunder the judgment of the Supreme Court of Mississippi may be reversed.

III.

If said appeal were properly had, and if the Court should hold it had jurisdiction to reverse, then that determined by the Mississippi Supreme Court was only

an interpretation of a local contract in so far as these Appellees are concerned.

WHEREFORE these Appellees, having but just received the printed transcript, make this motion, having specifically reserved their rights so thus to do (Tr., 102).

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
E. H. RATCLIFF,
JOSEPH E. BROWN,
W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees,
By GARNER W. GREEN.

Of Counsel:
BRADLEY, BALDWIN, ALL
& WHITE.

To Messrs. Arthur G. Powell, W. Calvin Wells, L. Barrett Jones, counsel for appellant:

Please take notice that the foregoing motion to dismiss or affirm, with the annexed brief, will be presented to the Supreme Court of the United States upon the fourth day of December, 1931, or as soon thereafter as may be, for the decision of the Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
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JOSEPH E. BROWN,
W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees.

Service of the foregoing is hereby acknowledged this November 30, 1931.

ARTHUR G. POWELL,
W. CALVIN WELLS,
L. BARRETT JONES,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

v.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

MOTION TO DISMISS OR AFFIRM.

BRIEF AND ARGUMENT.

General Statement.

Enochs Lumber & Manufacturing Company, Ingalls Iron Works, O. L. Bunn, doing business as Bunn Electric Co.; Coburn Trolley Track Mfg. Co., Gibbens & Gordon, Inc., Hockaday, Inc., The R. C. Lieb Co., Natchez Drug Co., National Show Case Co., Schwartz & Stewart, Walter C. Schultz, doing business as

Schultz Cabinet Works; Southern Cement Co., Truscon Steel Co., White Stone Co., Woodward, Wight & Co., R. Lee Parker, Jr., R. Scudamore, Jr., R. Lee Parker, Jr., and R. Hicks Parker, copartners, doing business as Natchez Brick Co.; C. R. Burkett, doing business as Burkett Sheet Metal Works; W. A. Jacobie, Geisenberger Bros. Drug Co., M. P. Phelan, Mosler Safe & Lock Co. (herein called "Appellees"), move to dismiss or affirm, having specifically reserved this right (Tr., 102), wherein appearance was entered "without recognizing that any appeal has been validly made and without prejudice to right (to move) to dismiss."

Appellees were made defendants to the original bill (Tr., 1) filed by the Natchez Investment Company—not the Hartford Accident & Indemnity Company. None of the pleadings, nor any of the evidence, whereon the decree (Tr., 57) in favor of Appellees, intervenors in the Chancery Court, was rendered, appear, nor does that whereon the judgment in the Supreme Court (Tr., 74), the form of the judgment there being (Tr., 80):

> "Enochs Lumber & Mfg. Co., appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Ætna Casualty & Surety Company, surety in the appeal bond, the sum of ten thousand and three and thirty-eight one hundredths dollars, the amount of the decree in the court below, together with the further sum of five hundred and sixteen one-hundredths dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below, until paid at the rate of 6 per centum per annum."

The judgments in favor of other appellees are the same (Tr., 74-83).

The costs were taxed against the Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company in so far as these Appellees are concerned.

The Supreme Court of Mississippi heard the cause first upon appeal of the Hartford Accident & Indemnity Company to settle principles (Tr., 46); next, upon the appeal on the merits (Tr., 67); and, finally, upon a suggestion of error (Tr. 86).

Point I.

There being a joint judgment (Tr., 74-83) against Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company, no jurisdiction of an appeal by Hartford Accident & Indemnity Company alone.

In *Hardee* v. *Wilson,* 146 U. S. 180, 36 L. Ed. 933, Mr. Justice Shires declared:

> "Undoubtedly the general rule is that all the parties defendant, where the decree is a joint one, must join in the appeal. *Owings* v. *Kincannon,* 32 U. S. 7 Pet. 399 (8:727); *Mussina* v. *Cavazos,* 73 U. S. 6 Wall. 355 (18:810)."

Hughes Federal Practise, Sections 5430, 6153; *Maytin* v. *Vela,* 216 U. S. 598, 54 L. Ed. 623; *Babcock* v. *Norton,* 5 Fed. (2d), 154, Certiorari denied, 45 S. Ct. Rep. 509, 69 L. Ed. 1158, 268 U. S. 688; *Inglehart* v. *Stansbury,* 151 U. S. 71, 38 L. Ed. 563; *Davis* v. *The Mercantile Trust Co.,* 152 U. S. 588, 38 L. Ed. 563; *Sipperly* v. *Smith,* 155 U. S. 86, 39 L. Ed. 79; *Downing*

v. *McCartney*, 76 U. S. 394, 19 L. Ed. 757; *Winters* v. *U. S.*, 207 U. S. 564, 52 L. Ed. 340. The claim of each Appellee—materialman—is severally and separately determinable in this Court. *Seaver* v. *Bigelow*, 5 Wall., 208 (72 U. S., 18 L. Ed. 595); *Stewart* v. *Dunham*, 115 U. S. 61, 29 L. Ed. 329.

Point II.

Pleadings and proof presenting a Federal question condition jurisdiction here.

Appellees as well as Appellant were both defendants to the original bill (Tr., 1). Under State practise, as intervenors, Appellees severally sued Appellant, Hartford Accident & Indemnity Company, by cross-bill, which finally resulted in the judgment (Tr., 57) in the Chancery Court (Tr., 74, 80-81); in the Supreme Court. The three opinions rendered by the Supreme Court appear, Transcript, 46, 67, 86.

In this Court there is neither pleading nor proof presenting any Federal question within Section 237 of the Judicial Code as amended, Section 344 U. S. Code Annotated.

Jurisdiction here to review is not general, but limited to specific instances where Federal rights were set up in the State court and denied. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 53 L. Ed. 417; *Michigan Sugar Co.* v. *Dix*, 185 U. S. 112, 46 L. Ed. 829.

Initially, under *Williams* v. *Norris*, 12 Wheat. 117, 6 L. Ed. 571; *Rector* v. *Ashley*, 6 Wall. 142, 18 L. Ed. 733; *Gibson* v. *Chouteau*, 8 Wall. 314, 19 L. Ed. 317,

and the rules then in effect, the opinion of the State court could not be resorted to, to show a Federal question; but in *San Jose Land, etc., Co.* v. *San Jose Ranch Co.*, 189 U. S. 177, 180, 47 L. Ed. 765, it was said:

> "Under the rule of this Court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed', that it (Federal question) was fully considered in the opinion of the court and ruled against the plaintiff in error."

Here, in an intervention, where neither cross-bill, answer nor proof upon which the decree was rendered, appear, this Court is without a record upon which to reverse that done below, as to each several appellee. *Seaver* v. *Bigelow*, 5 Wall., 208 (72 U. S., 18 L. Ed. 595); *Stewart* v. *Dunham*, 115 U. S. 61, 29 L. Ed. 329. True, in intervention the practise is not clearly prescribed and thereasto there is confusion. *Hughes Federal Practise*, Sec. 3227. But no Federal question is here presented by the record as against these Appellees.

In *Suydam* v. *Williamson*, 20 How. 427, 15 L. Ed. 980, it is said:

> "When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the prac-

tice of such courts, he must be content to abide the consequences of his own neglect."

POINT III.

If said appeal were properly had, and if the Court should hold it had jurisdiction to reverse, then that determined by the Mississippi Supreme Court was only an interpretation of a local contract in so far as these Appellees are concerned.

Appellant is contractually liable to Appellees and the Mississippi Supreme Court so held, interpreting the Standard Form of Agreement between contractors and owners issued by the American Institute of Architects for use when a stipulated sum forms the basis of payment.

The agreement being in writing and annexed, controlled the averments of the pleader as to the rights thereunder arising. *McNeill* v. *Lee,* 79 Miss. 455; *Hanover National Bank* v. *Montgomery,* 79 Miss. 443.

Under *Union Indemnity Company* v. *Acme Blow Pipe Co.,* 117 So. 251, 150 Miss. 332, "The bond was part of the contract and the contract was made part of the bond," Mississippi laws controlling. *Ramsey & Gatlin Construction Co. et al.* v. *Vincennes Bridge Co.,* 283 U. S. 796, 75 L. Ed. 1420.

Under Article 30, quoted at length in opinion Supreme Court (Tr., 47) on first appeal, and in the opinion on the Suggestion of Error (Tr., 87):

> "It shall be the obligation of every contractor and sub-contractor estimating upon work under this contract operation to figure and to include

> within his bid to furnish a bond *in the sum and conditioned as the law of the State of Mississippi requires,* in a surety company satisfactory to the Owner or Architect. * * * The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the Owner against all liens or claims that may be filed against the building *according to the laws of the State of Mississippi.*"

As was said in *Pennsylvania Fire Ins. Co.* v. *Gold Issue Min. & M. Co.,* 243 U. S. 95, 61 L. Ed. 616:

> "The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. New York, L. E. & W. R. Co. *v.* Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert."

Especially when, under Article 3 (Tr., 11), the amount to be paid the contractor was the precise amount of the bond (Tr., 18)—$316,822.00, and the Statute of

Mississippi (Sec. 2276, Code 1930, then in effect) provides:

> "When any contractor * * * entering into a formal contract with any person * * * for the construction of any building * * * shall enter into a bond with such person guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations *that such contractor * * * shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond,*".

if the owner is to be free from liens as stated by the Mississippi Supreme Court (Tr., 55). And that held by the Supreme Court of Mississippi was that this bond so thus by contract did, the Court saying (Tr., 55):

> "In determining this question, we are to construe the bond in the light of the contract which the bond refers to, and, in so doing, it will appear *that the parties intended to execute the bond provided for and required by the contract between the owner and contractor*, and, by reference to the quoted provisions in the statement of facts, it will be seen that the contractor was required to give such a bond as was called for

by Section 3 of the act; and, we think it was the intention of all the parties to give the bond therein provided for, and that the bond is to be construed in connection with the contract it was designed to protect the owner and contractor, and that it was so dealt with by all parties. It will be seen from a recital of the bond itself that it referred to the contract, and to the plans and specifications made a part of the contract and the bond. This being true, it is plain we think that it was the intention and purpose of the parties to execute a bond in conformity with Section 3 of the Act above quoted.

"This brings the case within the decision rendered in the case of U. S. F. & G. Co. *v.* Parsons, *et al.*, 147 Miss. 335, 112 So. 469, and that case controls the present case. Consequently, it is manifest that the contractor was free to make assignments of the amount due, and that the amount assigned to the bank was a valid assignment, freed from the claims of the sub-contractors, journeymen, laborers and materialmen."

This holding as to the intention of the parties under the contract is a local question. *Ramsey & Gatlin, etc. Co.* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. ed. 1420. Especially, as by Article 4 (Tr., 11) of the contract, which allows payment on account on or about the 1st and 15th of each month, based on contractor's prices for labor and material, thereby each payment to be made by the owner to the contractor was conditioned by the precedent integration into the structure of materials or labor belonging to a third party.

As declared in *Lockland Lumber Co.* v. *Robinson*, 157 N. E. 376, 116 Ohio St. 725, materialmen's lien stat-

utes do not create substantive rights but are remedial, vouchsafing additional means for enforcing payment of a debt.

Article 5 (Tr., 12) specifically provides:

> "Before issuance of final certificate The Contractor *shall submit evidence satisfactory to the Architect that all pay rolls, material bills and other indebtedness connected with the work have been paid.*"

Article 6 makes "the general conditions * * * specifications and drawings, together with this agreement, form the contract, as if hereto attached or herein repeated" (Tr., 12).

Again (Tr., 14):

> "*The law of the place of building shall govern the construction of this contract.*"
>
> "The contract documents are complementary and what is called for by *any one shall be* as binding as if *called for by all.*"
>
> "Article 9. *Unless otherwise stipulated, the contractor shall provide and pay for all materials, labor, water, tools, equipment, light, power, transportation and other facilities necessary for the execution and completion of the work.*"

Article 22, which was not brought up in this transcript, but was in the State transcript, page 30, provided: "If he (the contractor) should fail to make prompt payment to subcontractors or for material or labor", then the owner might take possession and complete.

Likewise, under Article 24, the Contractor had to submit to the architect an application for each payment, and if required, receipts showing payment for materials and labor (Supreme Court Miss., Tr., 31).

Likewise, Article 24, not embraced within this transcript, further provided:

> "If payments are made on account of materials delivered and suitably stored at the site but not incorporated in the work, they shall, if required by the architect, be conditional, upon submission by the Contractor of bill of sale or such other procedure as will establish the owner's title to such material or otherwise adequately protect the owner's interest" (Miss. Supreme Court, Tr., 32).

> "Article 30. *The owner shall have the right prior* to the signing of the contract, to require the contractor *to furnish bond covering the faithful performance of the contract and the payment of all obligations arising thereunder, in such form as the owner may prescribe and with such sureties as he may approve*" (Tr., 15).

> "Article 32. Neither the final payment nor any part of the retained percentage shall become due until the Contractor, if required, shall have delivered to the owner a complete release of all liens arising out of this contract, or receipts in full in lieu thereof, and, if required in either case, an affidavit that so far as he has knowledge or information the release and receipts include all the labor and material for which a lien could be filed" (Tr., 15).

> "Article 30 (Tr., 16). *It shall be the obligation of every contractor* and subcontractor *estimat-*

ing upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the owner or architect, *contractor likewise to pay the cost of any required cancellation of the same. He shall also secure and pay for lien and privilege certificate which will be required of him before final payment is made under this contract.*

"The bond shall also secure the owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi, and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract, and the institution of concursus proceedings, if such proceedings become necessary.

*"Obligation of Bondsmen: The Contractor's bondsmen shall obligate themselves to all the terms and convenants of these specifications, and of the contract covering the work executed hereunder * * * "*

"The sureties of the various contractors shall be, and are hereby declared and acknowledge themselves to be, bound to the owner as guarantors, separately and in solido with the Contractors of the fulfillment of the terms of the foregoing."

See *Union Indemnity Co.* v. *Acme Blow Pipe Co.*, 117 So. 251, 150 Miss. 332; *Commercial Bank of Magee* v. *Evans*, 145 Miss. 643, 112 So. 482; *U. S. F. & G. Co.* v. *Parsons*, 147 Miss. 335, 112 So. 469, 53 A. L. R. 88.

We thus have a specific obligation to include in Burkes', the contractor's, bid a bond conditioned as the law of the State of Mississippi required, and by said Article 30 there is a further declaration that "the contractors' bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contract covering the work executed hereunder." So, when the Indemnity Company made this obligation, a part of its bond along with the declaration that such bond was conditioned as the law of the State of Mississippi required, and then, in addition, declared: "The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as Guarantors, separately and in solido, with the contractors of the fulfillment of the terms of the foregoing" (Tr., 17). That which went before declares the absolute obligation to pay all persons for materials (Art. 9, Tr., 14). By the execution of this bond, appellant accepted this obligation. Therefore, it received a premium computed upon the basis of the law of the State of Mississippi, requiring that appellant execute such an obligation, so securing those furnishing labor and materials, and having so thus been compelled to compute its premium as to include this obligation to pay materialmen and laborers in accordance with the law of Mississippi, it is not competent to pay losses on another and different basis, it being declared in *Insurance Company* v. *Shlenker,* 80 Miss. 667, 32 So. 155:

> "It might decline the insurance if it did not wish to run the moral risk in such a case. The

very life of the statute is that the company shall not receive premiums on one basis, and pay losses on another."

So that, if it were not a fact that the Indemnity Company was not obligated to make payments to materialmen, then this provision of this bond is meaningless. It connotes responsibility for the payment which might impute injury to the surety, if certain things were left undone. But the connotation of responsibility is inescapable, Sec. 6, *et seq.* especially enumerates those things not covered by the bond. In short, if the bond is not to make good the quality of work, nor of efficiency, nor the maintenance, nor for the payment of certain compensation for injuries, why enumerate, and especially why exclude the obligation to pay for labor and material. Note especially Sec. 7, whereunder the obligation is especially declared. This bond must be construed as a part of the plans and specifications, which are by it referred to, and by it made a portion of its obligation. Wheresoever made a portion of this obligation, there is in the bond those certain and specified provisions, that "the contractor shall provide and pay for all the materials, labor * * *" (Tr., 14).

It so thus being, thereby Appellant conclusively must be presumed to have meant what it said, and its contract is obligatory, and operative, and materialmen may sue thereon. *Lee* v. *Newman,* 55 Miss. 374, as modified in *Washington* v. *Soria,* 73 Miss., 675. No other interpretation can hereon be placed.

Therefore, that done by the Mississippi Court was the decision of a local question under a contract the

interpretation of which by the Supreme Court is here controlling. *Ramsey & Gatlin Const. Co.* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. ed. 1420.

Compare *Johnson Electric Co.* v. *Columbia Casualty Co.*, 133 So. 850 (Florida 1931), where it was declared:

> "The record discloses that the bond was in the form prescribed by the American Institute of Architects, which has been examined in several jurisdictions and construed as being sufficient to protect subcontractors not formal parties to it or the contract secured by it. American Surety Company of New York *v.* DeWald, 30 Ga. App. 606, 118 S. E. 703, text 705; Hartford Accident & Indemnity Company *v.* W. & J. Knox Net & Twine Company, 150 Md. 40, 132 A. 261; Pittsburgh Plate Glass Company, Inc., *v.* Fidelity & Deposit Company of Maryland, 193 N. C. 769, 138 S. E. 143; Mansfield Lumber Company *v.* National Surety Company, 176 Ark. 1035, 5. S. W. (2d) 294; Byram Lumber & Supply Company *v.* Page *et al.*, 109 Conn. 256, 146 A. 293; Fidelity & Deposit Company of Baltimore, Maryland, *v.* Rainer, 220 Ala. 262, 125 So. 55."

It is true that the form here involved has been somewhat modified, but the Supreme Court of Mississippi held that the modification was not effectual to change the obligation from that therein declared.

Compare *Asheville Supply & Foundry Co.* v. *Catawba Const. Co.* (N. C. 1930), 151 S. E. 93; *Pittsburgh Plate Glass Co. Inc.*, v. *Fidelity & Deposit Co. of Maryland*, 193 N. C. 769, 138 S. E. 143; *Aetna Casualty & Surety Co.* v. *U. S. Gypsum Co.*, 39 S. W. (2d) (Ky.

1931), 234; *Concrete Steel Co.* v. *Illinois Surety Co.* (Wis. 1916), 157 N. W. 543, 163 Wis. 41; *Algonite Stone Mfg. Co.* v. *F. & Dep. Co. of Maryland* (Kans. 1917), 163 Pac. 1076, 100 Kans. 28; *Aetna Casualty & Surety Co.* v. *Big Rock Stone & Material Co.* (Ark. 1929), 20 S. W. (2d), 180; *Leslie Lumber & Supply Co.* v. *Lawrence* (Ark. 1928), 11 S. W. (2d), 458; *Byram Lumber & Supply Co.* v. *Page,* 109 Conn. 256, 146 A. 293 (Conn. 1929); *Hartford Accident & Indemnity Co.* v. *W. & J. Knox Net & Twine Co.* (Md. 1926), 150 Md. 40, 132 A. 261; *American Surety Co. of New York* v. *DeWald* (Ga. 1923), 30 Ga. App. 606, 118 S. E. 703, text 705.

That for the contrary ruling as a matter of interpretation, compare *Central Supply Co.* v. *U. S. F. & G. Co.,* 173 N. E. (Mass. 1930), 697; *Maryland Casualty Co.* v. *Johnson,* 15 F. (2d) 253.

This statute of Mississippi is modeled upon the statute of the United States dealing with public contracts, which has been sustained and construed in *United States* v. *American Surety Co.,* 200 U. S. 200, 50 L. Ed. 441; *Mankin* v. *United States,* 215 U. S. 536, 54 L. Ed. 316; *Illinois Surety Co.* v. *John Davis Company;* 244 U. S. 375, 61 L. Ed. 1206.

It was perfectly competent for the Mississippi Court, as a matter of intention to segregate this bond into two obligations, one in favor of the owner, the other in favor of the materialmen, the contract so thus reading. *United States* v. *National Surety Co.,* 34 C. C. A., 528, 92 Fed. 551; *Dewey* v. *State,* 91 Ind. 173; *Doll* v. *Crume,* 41 Neb. 655, 59 N. W. 806; *Steffes* v. *Lemke,* 40 Minn. 97; *Kansas City Hydraulic Press Brick Co.*

v. *Natl. Surety Co.* (Mo. 1906), 149 Fed. 507; *U. S. F. & G. Co.* v. *Omaha,* 116 Fed. 145; *Pingrey on Suretyship and Guaranty,* Sec. 112, p. 139.

Further, this contract by a paid surety is to be most favorably interpreted for Appellees. *American Life & Accident Ins. Co.* v. *Nirdlinger,* 113 Miss. 74, 73 So. 875; *United States Fidelity & Guaranty Co.* v. *Citizens State Bank of Moorhead,* 116 So. 608, 150 Miss. 386.

With Appellant in the business for profit it unquestionably computed the premium upon the basis of this imposition and as said in *Byram Lumber & Supply Co.* v. *Page,* 109 Conn. (1929) 256, 146 A. 293:

> "It would be to close our eyes to the ordinary methods of such a business as it was conducting to doubt that it knew of the diverse views taken in regard to the construction of such bonds in different states; that it did not stand ready to accept a construction favorable to a direct action by persons situated like the plaintiff, if we should so construe the bond, and did not fix its premium accordingly. In that construction there can be no injustice to the appellant, and we can recognize the sound policy which it will serve."
>
> *U. S. F. & G. Co.* v. *United States,* 191 U. S. 416, 24 S. Ct. 142, 48 L. ed. 242, 246.

The Indemnity Company, doing business in Mississippi where all such obligations had been specifically sitused (sec. 5818, Hemingway's Code 1927, quoted in *Fidelity Mutual Ins. Co.* v. *Miazza,* 93 Miss. 18, 46 So. 817), agree that it would be bound in manner and form

as by the law of the State of Mississippi required, and that its bond was to be "in the sum and conditioned as the law of the State of Mississippi requires" (Tr. 17). The requirements of the law of the State of Mississippi cannot now be in doubt. This act was on the statute books, plain and unambiguous, and being so thus, the Appellant was admitted to do business upon condition of compliance with all laws of the State of Mississippi (Section 5136, Code 1930), and this was one.

As said in *Union Indemnity Co.* v. *Acme Blow Pipe Co.*, 117 So. 251, 150 Miss. 332:

> "It would be far better for those corporations, whose existence and maintenance depends upon following the law, to observe it rather than to flout it, or seek to contract against it. They are under no compulsion to make such bonds, but if they make them, such bonds will be construed and applied as if they had complied with the law."

The bond which it executed specifically declares (Tr., 18):

> "Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the contract) dated October 18, 1926, to construct 'Eola Hotel' building as per plans and specifications * * * a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof."

Hence, a specific obligation definitely set out was there referred to, and by said Article 30 it was expressly

provided that in addition there is "also the bond should secure the owner the full and faithful performance of the contract."

We thus have a specific obligation to include in Burkes' bid a bond conditioned as the law of the State of Mississippi required, and by said Article 30 there is a further declaration that "the contractors' bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contract covering the work executed hereunder", so, when the Indemnity Company made this obligation a part of its bond along with the declaration that such bond was conditioned as the law of the State of Mississippi required, and then, in addition, declared "The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as Guarantors, separately and *in solido*, with the contractors of the fulfillment of the terms of the foregoing (Tr., 17). That which went before declare the absolute obligation to pay all persons for materials (Art. 9, Tr. 14). Its meaning, as a contract, is solely a state question. *Ramsey & Gatlin Con. Co.* v. *Vincennes Bridge Co., supra.*

This Court has been liberal in protecting materialmen and sustaining the validity of legislation to that end. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 193 U. S. 540, 48 L. ed. 787; s. c., 30 C. C. A. 108, 86 Fed. 371.

We therefore submit that the judgment should be affirmed because based upon a construction of a local contract, even though the Federal question was raised, for the local question is an adequate basis for the de-

cision rendered. *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 8, 75 L. ed. 134; *Susquehanna Power Co.* v. *State Tax Com.*, 283 U. S. 300, 75 L. ed. 1049; *Atchison, T. & S. F. R. Co.* v. *Railroad Com.*, 283 U. S. 390, 75 L. ed. 1136.

Respectfully,

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(All italics ours.)